

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>92-11482</u>
GARY BURKE and)	
PAMELA B. BURKE)	
)	
Debtors)	
_____)	
GARY BURKE and)	FILED
PAMELA B. BURKE)	at 5 O'clock & 07 min. P.M.
)	Date: 8-9-95
Plaintiffs)	
)	
vs.)	Adversary Proceeding
)	Number <u>95-01050A</u>
STATE OF GEORGIA)	
DEPARTMENT OF REVENUE)	
)	
Defendant.)	
)	

ORDER

The State of Georgia Department of Revenue ("Department of Revenue") by motion seeks summary judgment against debtors Gary and Pamela Burke on the issue of nondischargeability of certain tax debts. Prior to this adversary proceeding, debtors filed a case under Chapter 13 of the Bankruptcy Code on August 14, 1992, converted said case to a proceeding under Chapter 7 on July 20, 1993, and received a discharge on February 1, 1994. Debtors moved to reopen the case on January 27, 1995 and subsequently filed a

complaint initiating this adversary proceeding which alleges post-discharge collection efforts by the Department of Revenue on scheduled tax debts for tax years 1980 through 1984 and 1990. Debtors' complaint seeks a determination of dischargeability of those tax claims. The Department of Revenue filed for summary judgment as to nondischargeability of all tax liabilities scheduled in the case.

FINDINGS OF FACT

The relevant factual record is chiefly contained in my order filed May 18, 1993 sustaining debtors' objection to the proof of claim filed by the Department of Revenue in the debtors' underlying Chapter 7 case. That order conclusively decided the general unsecured status of the 1980-1984 tax claims of the Department of Revenue. To briefly summarize, the order sustained the objection to classifying the Department of Revenue's claim as a priority tax claim because the returns were filed more than three years before the filing of this case. 11 U.S.C. §507(a)(8)(A)(i). The order makes clear that the contested issue was the requirement of an amended return; the Department of Revenue never contended, as it does now, that returns were not filed covering the contested years. Because the May 18, 1993 order is final and dispositive as to the amount and claim status of the 1980-1984 tax returns filed by the debtors, that issue will not be relitigated in this adversary proceeding.

ANALYSIS OF LAW

This court has jurisdiction to hear this matter under 28 U.S.C. §157(b)(2)(I) and 28 U.S.C. §1334. The standard of review for a motion for summary judgment is that applicable to Rule 56 of the Federal Rules of Civil Procedure ("FRCP") which is incorporated into bankruptcy practice by Federal Rule of Bankruptcy Procedure 7056. FRCP 56(a) provides that "[a] party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." The moving party bears the burden of proof that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Cowan v. J.C. Penney Co. Inc., 790 F.2d 1529 (11th Cir. 1986). Thus, "[t]o prevail on a motion for summary judgment, [the movant] must prove there is no dispute as to any material fact and based on the material facts, to which the parties are in agreement, [the movant] is entitled to judgment as a matter of law." Haile Co. v. Reynolds Tobacco Co. et al. (In re Haile Co.), Chapter 11 case No. 88-40864 Adv. 90-4118 slip op. at p. 5 (Bankr. S.D. Ga. Dalis, J. Sept. 27, 1991). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should

be resolved in favor of the opponent [to the summary judgment motion]." Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986). See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). As summary judgment is a drastic remedy, it should not be granted unless the movant establishes "that the other party is not entitled to recover under any discernible circumstances." Robert Johnson Grain Co. v. Chem. Interchange Co., 541 F.2d 207, 209 (8th Cir. 1976) (emphasis added). Accord In re Marks, 40 B.R. 614 (Bankr. D.S.C. 1984). Summary judgment is appropriate here to resolve this matter because what is required is merely an application of the United States Code and relevant case law to factual determinations made by me in my May 18, 1993 final order.

A. The 1990 Tax Claim:

Income tax claims relating to taxable years where the returns are due within three years of the filing of the petition in bankruptcy are priority tax claims. 11 U.S.C. §507(a)(8)(A)(i).¹

¹11 U.S.C. §507(a)(8)(A)(i) provides in relevant part:

(a) The following expenses and claims have priority in the following order . .

.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts--
(i) for a taxable year ending on
or before the date of the filing of the

Priority tax claims are excepted from discharge. See 11 U.S.C. §523(a)(1)(A).² This status of priority tax claims includes State tax claims. See generally 3 Collier on Bankruptcy ¶523.06[2] (15th ed. 1995) (Congressional Record indicates priority status available for, inter alia, Federal, State and local income and gross receipts taxes). The Department of Revenue claim for 1990 taxes is a priority tax claim by virtue of the deadline for filing such a return. Georgia individual income tax returns are due on or before April 15th of the year following a calendar taxable year. O.C.G.A. §48-7-56(a) (unless taxpayer granted an extension or on a fiscal year). Plaintiffs' 1990 return was due on April 15, 1991, clearly within three years prior to August 14, 1992, the date plaintiffs

petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition; . . .

²11 U.S.C. §523(a)(1)(A) provides in relevant part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

filed the petition in bankruptcy. The claim for 1990 taxes is therefore a priority claim under §507(a)(8)(A)(i) and nondischargeable under §523(a)(1)(A). Debtors concede as much in their response to the motion for summary judgment. Accordingly, partial summary judgment on behalf of the Department of Revenue is appropriate as to the nondischargeability of the tax claim relating to tax year 1990.

B. Claims for 1980 through 1984:

My prior order in the underlying bankruptcy case determining that the Department of Revenue is the holder of a general unsecured claim with respect to 1980-1984 taxes is conclusive. An order setting the amount or priority of a creditor's claim is a final order. In re Saco Local Dev. Corp., 711 F.2d 441, 445-46 (1st Cir. 1983); see also United States v. Stone (In re Stone), 6 F.3d 581, 583 n.1 (9th Cir. 1993) ("a bankruptcy order is appealable where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed") (quoting In re Frontier Properties, Inc., 979 F.2d 1358, 1363 (9th Cir. 1992)). An appeal from a final order must be taken within 10 days. See Fed. R. Bankr. P. 8001(a); Fed. R. Bankr. P. 8002(a). Because I find no record of appeal of my May 18, 1993 order, the general unsecured status of the Department of Revenue's claim for tax years 1980 - 1984 is res judicata.

The effect of a discharge is clear; section 727(b) of the Bankruptcy Code provides:

(b) Except as provided in section 523 of this title [11], a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . .

I find no provision for general unsecured tax claims in the statutory exceptions to discharge found in §523. Consequently, the unsecured claim is subject to the discharge order and the Department of Revenue, as a pre-petition creditor, may not collect discharged debts. 11 U.S.C. §524(a)(2). Summary judgment is denied for the Department of Revenue on tax claims for years 1980 through 1984.

Summary judgment may be granted in favor of a party opposing the motion of summary judgment, despite the lack of an appropriate cross motion. Bosarge v. U.S. Dep't of Educ., 5 F.3d 1414, 1416 n.4 (11th Cir. 1993), cert. denied 114 S.Ct. 2720, 129 L.Ed.2d 845, 1994 U.S. LEXIS 4778 (1994); Lindsey v. U.S. Bureau of Prisons, 736 F.2d 1462, 1463 (11th Cir. 1984), vacated on other grounds, remanded, 469 U.S. 1082, 105 S.Ct. 584, 83 L.Ed.2d 695 (1984); 10A Wright, Miller & Kane, Federal Practice and Procedure § 2720 (1995) ("the weight of authority is that summary judgement may be rendered in favor of the opposing party even though he has made no formal cross motion under Rule 56"). Contra Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1556 (11th Cir. 1991), aff'd 113 S.Ct. 1732, 123 L.Ed.2d 387, 1993 U.S. LEXIS 2982 (1993). Plaintiff shall therefore be granted summary judgment as to the discharge of taxes owed for the years 1980 through 1984, notwithstanding the failure to

file a cross motion for summary judgment. The record shows some claimed accrual of interest on the discharged tax claims. That interest is accorded the same status as the underlying tax claim and discharged as well. Cf. Matter of Larson, 862 F.2d 112, 119 (7th Cir. 1988) (pre-petition interest on nondischargeable tax liability is nondischargeable).

It is hereby ORDERED that partial summary judgement is GRANTED to the State of Georgia Department of Revenue determining the tax claim for the year 1990 not discharged in plaintiffs' Chapter 7 case; and further

ORDERED that the State of Georgia Department of Revenue's motion for summary judgment with respect to tax liabilities relating to tax years 1980 through 1984 is DENIED; and further

ORDERED that plaintiffs Gary and Pamela Burke are GRANTED summary judgment determining tax liabilities and interest thereon for tax years 1980 through 1984 discharged in their Chapter 7 case.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 9th day of August, 1995.